

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF IDAHO**

**RICHARD BUTLER, on behalf of the  
CHURCH OF JESUS CHRIST  
CHRISTIAN ARYAN NATION, an  
unincorporated membership association,  
P.O. Box 362, Hayden, ID 83835,**

**Plaintiff,**

**vs.**

**SUSAN WEATHERS, Clerk, STEPHEN  
JUDY, Mayor, and CITY OF COEUR  
D'ALENE, 710 Mullan Avenue, Coeur  
d'Alene, ID 83814,**

**Defendant.**

CASE NO: CV99-266-N-EJL

**ORDER**

On the afternoon of July 6, 1999, the Plaintiff, Richard Butler, filed his Complaint and Motion for Temporary Restraining Order and/or Preliminary Injunction regarding the Church of Jesus Christ Christian/Aryan Nations' permit to parade in Coeur d'Alene, Idaho on July 10, 1999. Named as defendants are the City Clerk, City Attorney and Mayor of Coeur d'Alene. The Court held an informal

hearing with counsel for the parties on July 7, 1999, and indicated the Court would issue its order after review of the Defendants' response to the motion. The Court also drove the parade route on Ramsey Road. The Court is familiar with the Sherman Avenue area of downtown Coeur d'Alene. The Court finds the motion to be primarily a legal question and is prepared to rule upon the motion without an evidentiary hearing due to the time constraints involved in this matter.

### **FACTUAL BACKGROUND**

On May 17, 1999, Mr. Butler filed for a parade permit with the City of Coeur d'Alene ("City"). The permit was on behalf of the Church of Jesus Christ Christian/Aryan Nations ("CJCC/AN"). Mr. Butler is the pastor of said church. In the application, Mr. Butler requested a parade permit for July 3, 1999, or in the alternative, July 10, 1999. Mr. Butler represented that the number of participants in the parade would be 400. The parade route requested was the same as used by CJCC/AN the previous year which involved a circular route starting and ending at City Park and proceeding down Sherman Avenue. Mr. Butler requested the parade to begin at 9:00 a.m. and end at 11:00 a.m.

On June 1, 1999, the City Clerk, Susan Weathers, mailed a letter to Mr. Butler indicating a permit would be issued for July 10, 1999, but with certain conditions. The conditions included that the parade route would be on Ramsey Road instead of Sherman Avenue in order to eliminate congestion downtown; so that access to Tubbs Hill, the City parking lots, boat ramps, baseball fields (which are scheduled for use) would not be impacted; to allow for more parking; and for public safety.

In a letter dated June 2, 1999, but postmarked June 16, 1999, Mr. Butler objected to the date of July 10, 1999, and the proposed route down Ramsey Road. The City did not deem the letter as an appeal of the permit decision. The City has prepared for the parade to proceed down Ramsey Road.

Other facts which were provided to the Court during the informal hearing were that last year's parade by CJCC/AN involved approximately 70 persons. None of last year's marchers were arrested

or were involved in any violent or unlawful conduct. The estimated number of spectators to last year's CJCC/AN parade was approximately 1,400 to 1,500 persons. There were some arrests and citations issued against onlookers as a result of last year's parade. The traditional parade route for the City is to allow parades to proceed from 13<sup>th</sup> Street down Sherman Avenue to Northwest Boulevard or Government Way. The normal parade route is not circular as the circular route requires more streets to be blocked. No other parade permits have been issued by the City for the Ramsey Road route.

Counsel for Plaintiff indicated at the informal hearing the expected number of CJCC/AN participants was substantially lower than the estimated number of 400 on the permit application due to the fact that the parade was occurring on July 10, 1999 instead of July 3, 1999.

### **JURISDICTION**

The Complaint alleges violations of the Plaintiff's constitutional rights in violation of 42 U.S.C. § 1983, et. seq. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331.

### **STANDARD OF REVIEW**

Rule 65(b) of the Federal Rules of Civil Procedure provides for temporary restraining orders to be issued ex parte. However, it is the policy of this Court, whenever possible, to ensure that all parties are properly served and are afforded an opportunity to file written responses to motions and to be present at hearings. The Court was advised by Plaintiff's counsel that the Defendants were personally served with the Complaint, Motion for Temporary Restraining Order and/or Preliminary Injunction and related briefing. The Court's staff attorney contacted the City Attorney, Jeff Jones, and indicated the Defendants should file a written response to the motion on or before Wednesday, July 7, 1999. Because the Court has received a response from the Defendants, the Court will deny the motion for temporary restraining order and address the motion for a preliminary injunction.

Fed. R. Civ. P. 65(a) discusses the procedure to be followed on an application for a preliminary injunction. Broadly defined, a preliminary injunction is a judicial remedy that is issued to protect a plaintiff from irreparable harm while preserving the court's power to render a meaningful decision after a trial on the merits. Thus, a preliminary injunction may issue even though a plaintiff's right to permanent injunctive relief is not certain. The granting or denial of a preliminary injunction is a matter of the court's discretion exercised in conjunction with the principles of equity. See: Inland Steel v. U.S., 306 U.S. 153, 59 S. Ct. 415 (1939); Deckert v. Independence Shares Corp., 311 U.S. 282, 61 S. Ct. 229 (1940); and Stanley v. Univ. of Southern California, 13 F.3d 1313 (9th Cir. 1994).

While courts are given considerable discretion in deciding whether a preliminary injunction should enter, and injunctive relief is not obtained as a matter of right, it is also considered to be an extraordinary remedy that should not be granted unless the movant, by a clear showing, carries the burden of persuasion. See: Sampson v. Murray, 415 U.S. 61, 94 S. Ct. 937 (1974); Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. Co., 363 U.S. 528, 80 S. Ct. 1326 (1960); and Stanley v. Univ. of Southern California, 13 F.3d 1313 (9th Cir. 1994).

In the case of Martin v. International Olympic Committee, 740 F.2d 670, 674-675 (9th Cir. 1984), the Ninth Circuit stated that a party seeking preliminary injunctive relief must meet one of two tests. Under the first,

[A] court may issue a preliminary injunction if it finds that: (1) the [moving party] will suffer irreparable harm if injunctive relief is not granted, (2) the [moving party] will probably prevail on the merits, (3) in balancing the equities, the [non-moving] party will not be harmed more than [the moving party] is helped by the injunction, and (4) granting the injunction is in the public interest.

Id. (internal quotations and citations omitted); and Stanley v. Univ. of Southern California, 13 F.3d 1313, 1319 (9th Cir. 1994). Under the second, the movant must show "either (1) a combination of

probable cause on the merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits, the balance of hardships tipping sharply in its favor, and at least a fair chance of success on the merits.” Miller v. California Pacific Medical Center, 19 F.3d 449, 456 (9th Cir. 1994) (en banc). This alternative test is on a sliding scale: the greater the likelihood of success, the less risk of harm must be shown, and vice versa. Id.

Speculative injury is insufficient to support a finding of irreparable harm. As the Ninth Circuit has stated,

Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction . . . a plaintiff must do more than merely allege imminent harm to establish standing, a plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief.

Carribean Marine Service Co. v. Baldridge, 844 F.2d 668, 674 (9th Cir. 1988).

### INJUNCTION ANALYSIS

For the reasons set forth in this decision, the Court finds that the Plaintiff is entitled to injunctive relief. The Plaintiff has established irreparable injury even though the motion for injunctive relief was not timely filed after the issuance of the conditional parade permit on June 1, 1999. “The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury.” Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690 (1976). In the present case, the City is restricting, not prohibiting the First Amendment rights of the Plaintiff. However, the effect is the same -- the First Amendment rights are being infringed and that amounts to irreparable injury.

In addition to irreparable injury, the Court finds that the Plaintiff has established that they are likely to prevail on the merits of their argument relating to the re-routing of the parade. See First Amendment Analysis. The balancing of hardships test is a close call for the Court in that the City maintains that it cannot prepare for a change in location for the parade at this late date and the Plaintiff should not benefit from filing his motion for relief four days before the scheduled parade. The Court is

mindful of the City's logistical argument, but the reality is that parades are regularly held in Coeur d'Alene along Sherman Avenue and the preparation for this parade (i.e. road blocks) is not significantly different based upon the reduced number of participants. As discussed later in this order, the potential for violence and inconvenience on the part of the police is not justification for infringing on First Amendment rights. Therefore, the Court finds the balance of the hardships tips in Plaintiff's favor even though the motion should have been filed earlier.

Finally, the Court finds that it is in the public interest to grant the injunction. "[T]he purpose behind the Bill of Rights, and of the First Amendment in particular [is] to protect unpopular individuals from retaliation--and their ideas from suppression--at the hand of an intolerant society. . . . political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." McIntyre v. Ohio Elections Com'r 514 U.S. 334, 357 (1995). "Speech that stirs passions, resentment or anger is fully protected by the First Amendment." Collins v. Jordan, 110 F.3d 1363, 1371 (9<sup>th</sup> Cir. 1997). Accordingly, the activities such as the parade planned by CJCC/AN are clearly protected by the First Amendment of the Constitution. In order to protect the rights of all members of the public to speak freely, the Court must enter the injunction.

The Court agrees with the Defendants that public safety is also to be considered in determining what is in the public interest. But it is improper to hold the Plaintiff responsible for isolated instances of unlawful conduct that occurred with spectators at last year's parade. Further, the Court is confident the City can address the security issues related to this parade in the short amount of time before the parade begins if the parade is along the traditional parade route used in Coeur d'Alene.

The Court finds that Plaintiff has satisfied the requirements for injunctive relief as set forth by the Ninth Circuit and the Court will grant the Plaintiff certain injunctive relief, but not the entire relief sought by the Plaintiff. The Court will allow the CJCC/AN to parade down the traditional parade route

in Coeur d'Alene, but will not require the City to allow the circular parade route as requested by Plaintiff in his application due to the inexcusable delay in filing the motion for a temporary restraining order and/or a preliminary injunction which created an unreasonable hardship on the City to timely commit necessary resources and police power to an area not traditionally used for parades.

### **ADMINISTRATIVE EXHAUSTION ANALYSIS**

The Court finds that even though Mr. Butler may not have properly appealed the conditional parade permit, exhaustion of administrative remedies is not required as a prerequisite to bringing an action pursuant to 42 U.S.C. § 1983. Patsy v. Board of Regents of the State of Florida, 457 U.S. 496, 102 S. Ct. 2557 (1982). Therefore, the Court can proceed in its analysis of the alleged First Amendment violations.

### **FIRST AMENDMENT ANALYSIS**

The Court conducts the following analysis of the First Amendment to support its finding that the Plaintiff has a likelihood of success on the merits and that the safety issues presented by the City to justify the re-routing of the parade are insufficient to survive a First Amendment challenge. The Court does not adopt this analysis as its final determination on the merits of Plaintiff's claims.

As discussed earlier, CJCC/AN's proposed parade is the type of activity afforded protection under the First Amendment. "A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." Terminiello v. Chicago, 337 U.S. 1, 4, 69 S. Ct. 894, 896 (1949). However, even protected speech is subject to reasonable restrictions. As stated by the Supreme Court in Ward v. Rock Against Racism, 491 U.S. 781, 109, S. Ct. 2746, 2753 (1989):

“[I]n a public forum, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions “are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”

This Court needs to determine for purposes of the pending motion for injunctive relief if the challenged parade permit is “narrowly tailored” to serve a “significant governmental interest” and whether the CJCC/AN is able to reach its “intended audience” under the current permit.

1. Time, Place and Manner Restriction

“To ascertain what limits, if any, may be placed on protected speech,” the United States Supreme Court has “often focused on the ‘place’ of that speech, considering the nature of the forum the speaker seeks to employ.” Frisby v. Schultz, 487 U.S. 474, 479 (1988). Cf. id. at 480 (identifying the relevant forum by reference to the place of past demonstrations); United States v. Fee, 787 F. Supp. 963, 967 (D. Colo. 1992) (identifying the relevant forum by the access sought). Similarly, CJCC/AN’s “intended audience” includes members of the public who would normally be attracted to a parade of this nature in the public forum comprising downtown Coeur d’Alene. See Bay Area Peace Navy v. United States, 914 F.2d 1224, 1229 (9th Cir. 1990) (analyzing the affect of First Amendment restriction by reference to the intended audience).

“[T]he standards by which limitations on speech must be evaluated ‘differ depending on the character of the property at issue.’” Frisby, 487 U.S. at 479. The Supreme Court has “identified three types of fora: ‘the traditional public forum, the public forum created by government designation, and the nonpublic forum.’” Id. at 479-80. City streets and sidewalks are public fora. United States v. Grace, 461 U.S. 171, 177, 103 S. Ct. 1702, 1706-07 (1983). Restrictions on First Amendment activities in public fora are “subject to a particularly high degree of scrutiny.” NAACP Western Region v. City of Richmond, 743 F.2d 1346,1355 (9<sup>th</sup> Cir. 1984). In this case, it is undisputed that the parade route is



a “public forum” entitled to the highest level of scrutiny.

Moreover, the restriction on the defendants’ ability to access the public forum is a “prior restraint” on the exercise of First Amendment rights.<sup>1</sup> Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992) (explaining that an ordinance is a prior restraint where those who wish to engage in a First Amendment activity must first obtain a permit). “[T]here is a ‘heavy presumption’ against the validity of a prior restraint.” Id.; see also United States v. Christopher, 700 F.2d 1253, 1260 (9th Cir.), cert. denied, 461 U.S. 960 (1983). However, where, as here, access to the forum is regulated by a permit system, the restriction may be constitutionally permissible if the permit scheme controlling the time, place and manner of speech is (1) content neutral; (2) narrowly tailored to serve a significant governmental interest; and (3) leaves open ample alternative channels of communication. Forsyth County, 505 U.S. at 130; Gaudiya Vaishnava Soc’y v. City and County of San Francisco, 952 F.2d 1059, 1065 (9th Cir. 1990), cert. denied, 504 U.S. 914 (1992); United States v. Kistner, 68 F.3d 218, 221 (8th Cir. 1995). The Plaintiff alleges that the parade route in the conditional permit is not content-neutral.

## 2. Content Neutral and Significant Governmental Interest

“A time, place, or manner regulation is content neutral if the government can justify the restriction without reference to the content of the regulated activity.” Kistner, 68 F.3d at 221. The Plaintiff does not dispute that the ordinance allowing parade permits to be issued is content neutral on its face. Rather, the Plaintiff argues the selection of the Ramsey Road parade route solely for the CJCC/AN parade is not a content-neutral application of the parade permit ordinance. The Court agrees.

The test to determine if the application of a regulation is content neutral is whether the City has

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<sup>1</sup> “[P]rior restraints have ‘had this in common: they gave public officials the power to deny use of a forum in advance of actual expression.’” Ward v. Rock Against Racism, 491 U.S. 781, 795 n.5 (1989).

adopted a restriction because of its disagreement with the message of the CJCC/AN. Based on the “Open Letter to the Citizens of Coeur d’Alene” published in the local newspaper by the Mayor and City Counsel, the Defendants clearly find the message of the CJCC/AN offensive and have selected the Ramsey Road route in part to remove the marchers from the traditional parade route in Coeur d’Alene.

The Defendants counter that the decision to issue the conditional parade permit was solely the decision of the City Clerk based on input from the Chief of Police. The record does not support this conclusion as the Mayor, City Council and presumably the City Attorney charged with advising the Mayor and City Council have been discussing the parade request since the conclusion of the parade last year. See “Open Letter to the Citizens of Coeur d’Alene.” While the City Clerk may technically have the final say in issuing the parade permits, all the Defendants were clearly involved in the decision on the CJCC/AN’s request.

The Defendants next argue that the concerns listed in the conditional permit approval are content-neutral reasons that support the re-routing of the parade to Ramsey Road and that the reasons, individually or collectively support a finding of a “significant governmental interest” to justify the re-routing of the parade. The Court respectfully disagrees.

First, the traffic congestion in downtown Coeur d’Alene and the scheduled activities at Tubbs Hill, the boat ramp and baseball fields are not proper grounds to deny the requested parade route. Avoiding annoyance and inconvenience are not reasons that amount to the substantial governmental interests necessary to regulate speech. Carreras v. City of Annaheim, 768 F.2d 1039, 1046 (9<sup>th</sup> Cir. 1985). The City has recently handled much larger groups parading or attending activities downtown and this does not justify moving the parade to Ramsey Road. Additionally, the parade’s conditional permit provides for assembly of marchers beginning at 9:15 a.m., the parade to begin at 10:00 a.m. and to end by 11:00 a.m. The two-hour period of potential congestion and parking difficulties is a minor inconvenience. In light of the established case law, these reasons for re-routing strike the Court as

pretextual reasons for denial of the downtown route.

The City's argument that the parking demands for 400 marchers would better handled at Ramsey Park than Independence Park is again an convenience argument that fails to establish a "significant governmental interest" to justify the re-routing of the parade. Additionally, counsel indicated that the actual number of marchers would be substantially less than 400 since the date is July 10<sup>th</sup> instead of July 3<sup>rd</sup>. The Court finds there is sufficient parking at Independence Park and elsewhere downtown to handle the parking needs of the marchers and spectators.

The strongest argument for the City in re-routing the parade is security and safety concerns. The Court acknowledges that the City is rightfully concerned about security and safety of its citizens, the marchers and spectators. However, the security concerns in the record before this Court do not rise to the level of a "significant governmental interest" to justify the re-routing of the parade. "Enjoining or preventing First Amendment activities before demonstrators have acted illegally or before the demonstration poses a clear and present danger is presumptively a First Amendment violation." Collins v. Jordan, 110 F.3d 1363, 1371 (9<sup>th</sup> Cir. 1997)(citing Carroll v. President and Com'rs of Princess Anne, 393 U.S. 175, 180-81, 89 S. Ct. 347, 351-52 (1968). In the present case, there is an absence of evidence supporting a finding that there is a "clear and present danger" associated with the CJCC/AN parade request on Sherman Avenue.

A general exclusion grounded on the perceived association of the applicant with a disfavored group or point of view, and without consideration of the particular applicant's proposal, is rarely enforceable. Cf. Shuttlesworth, 394 U.S. at 157-58 (disapproving of officials' denial of permit applications based on group affiliation and viewpoint of the applicants); Frisby, 487 U.S. at 481 (stating that for the government to enforce a content-based exclusion it must show that the regulation is necessary to serve a compelling governmental interest and that it is narrowly drawn to achieve that end). Of course, the denial of a particular permit may be appropriate if the applicant proposes a First

Amendment activity that is at odds with the “narrow, objective, and definite standards” guiding the decision-maker’s judgment. Such standards might include objective criteria for evaluating the proposed activity for potentially unlawful or violent conduct. See, e.g., Christopher, 700 F.2d at 1260-61 & n.5; Kistner, 68 F.3d at 221. Since the City did not deny the permit outright, this issue need not be addressed at this time.

The proposed restriction in the conditional parade permit of First Amendment activity in this particular case is not permitted “simply because prior similar activity led to or involved instances of violence” or unlawful conduct. Collins v. Jordan, 110 F.3d 1363, 1372 (9th Cir. 1997). “The generally accepted way of dealing with unlawful conduct that may be intertwined with First Amendment activity is to punish it after it occurs, rather than to prevent the First Amendment activity from occurring in order to obviate the possible unlawful conduct.”<sup>2</sup> Id. at 1371-72.

The City also argues in its response it is too late to change the route of the parade to Sherman Avenue due to the security and emergency plans that need to be completed for the CJCC/AN event. The Court respectfully disagrees. The Court is issuing its order on July 8<sup>th</sup> to allow the City as much time as possible to alter its plans. Additionally, preparation for the traditional parade route versus a looped route should not require significant additional planning.

The Court finds the Defendants have failed, for purposes of the pending motion, to establish a “significant governmental interest” regarding security and public safety issues related to the traditional Sherman Avenue parade route to justify restricting the Plaintiff’s First Amendment rights.

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<sup>2</sup> By scheduling the time, place and manner of First Amendment expression, a constitutionally valid permit system allows the governmental authority to prepare for any possible unlawful or violent conduct. “The courts have held that the proper response to potential and actual violence is for the government to ensure an adequate police presence and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure.” Jordan, 110 F.3d at 1372 (citation omitted).

3. Intended Audience

As mentioned earlier, the intended audience of the CJCC/AN includes members of the public who would normally be attracted to a parade of this nature in the public forum comprising downtown Coeur d'Alene. Like the plaintiffs in Bay Area Peace Navy v. United States, 914 F.2d 1224 (9<sup>th</sup> Cir. 1990), the conditional parade permit at issue does not allow the CJCC/AN to reach its intended audience. “[S]o long as the means chosen [to restrict speech] are not substantially broader than necessary to achieve the government interest, [ ] the regulation will not be invalid simply because a court concludes that the governmental interest could be served by some less-speech-restrictive alternative.” Ward, 109 S. Ct. at 2758. Here, the governmental restriction is to re-route the parade to the outskirts of town. The Court agrees with the City that the Ramsey Road is a major thoroughfare and that a passerby would be unable to tell Ramsey Park sits atop the former city dump. Even though the Ramsey Road route would allow the CJCC/AN to achieve their original goal of a circular parade route, the route also effectively removes their intended audience from the parade. The lack of any historical use of Ramsey Road as a parade route supports this Court’s finding that the City is doing more than trying to provide security (which this Court rejects as a “significant governmental interest” under the facts of this case), it is routing the parade based on the content of the CJCC/AN message. The re-routing of the parade appears to the Court to be a broader than necessary restriction to achieve the governmental goal of public safety and not a case of the Court attempting to invalidate a permit because the Court finds there is a less restrictive means to an end. Further, the Court finds the re-routing of the parade does not provide adequate channels of communication for the CJCC/AN and removes the parade from the intended audience in potential violation of the First Amendment.

## ORDER

In order to protect the rights of all persons to exercise their freedom of speech provided by the Constitution and being fully advised in the premises, the Court hereby orders:

- 1) Plaintiff's Motion for Temporary Restraining Order is **DENIED**.
- 2) Plaintiff's Motion for a Preliminary Injunction is **GRANTED IN PART AND DENIED IN PART**. Said motion is granted to the extent that the Plaintiff's application for a permit to parade down Sherman Avenue. A permit shall be deemed issued to allow the CJCC/AN to parade the traditional parade route from approximately 13<sup>th</sup> Street to Sherman to Northwest Blvd. or Government Way.<sup>3</sup> Said motion is denied to the extent that the CJCC/AN shall not be allowed to parade in the circular route requested on the parade permit (City Park to Sherman to 7<sup>th</sup> Street, 7<sup>th</sup> Street to 6<sup>th</sup> Street, 6<sup>th</sup> Street to Sherman, return to City Park). All other conditions not affected by the route change included in the permit dated June 1, 1999, shall remain as set by the City Clerk (i.e. starting and ending times, restrictions, etc.). The City Clerk shall forthwith give written notice to counsel for Plaintiff of the assembly points and parking plans for this new parade route.

Dated this \_\_\_\_\_ day of July, 1999.

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EDWARD J. LODGE  
UNITED STATES DISTRICT JUDGE

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<sup>3</sup>The Court's intent is to allow the CJCC/AN parade to be no longer in length than the typical parade on the traditional parade route defined by counsel for the City during the informal hearing. The City shall put in writing to Plaintiff's counsel a more definite description of the route and the one-way direction in which it will proceed.

